PRESENT DAY LABOR LITIGATION

The extent to which contractual relations enter into the various phases of labor litigation makes it advisable that they be discussed separately. In the preceding comments[1] questions involving contractual relations were expressly excluded. Where one party to a dispute violates a contractual obligation, to what extent does this modify the general rules suggested previously? This question is of particular importance at this time because of the recent extension of collective bargaining and the tendency to settle all labor questions by contract.

The primary situation is that in which the A employees strike against their employer B in violation of their contract of employment. Once the existence of a contract between A and B is proved, it follows that the violation of that contract is wrongful. It is true that it is difficult at times to determine the remedy to be applied, as will be taken up below, but still there seems to be unanimity of opinion that B should have a remedy.[2] If it is held otherwise, there would be but little benefit to A and B in governing their relations in this manner.

A more difficult situation arises, however, when a third person causes a breach of contractual obligations. This is now generally recognized as a tort when such third person is aware of the contract and intends to have one of the parties break it.[3] Where force or fraud is used, of course, it is everywhere a tort,[4] and we shall therefore exclude such

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[1] COMMENTS (1921) 30 YALE LAW JOURNAL, 280, 404, 501.

[2] "In cases of persons under a contract to work, a strike or combination not to work, in violation of that contract, to secure something not due them under the contract, would be a combination interfering without justification with the employers' business." *Reynolds v. Davis* (1908) 198 Mass. 294, 84 N. E. 457. In *Nederlandsch Amer. S. M. v. Stevedores' & L. B. Soc.* (1920, E. D. La.) 265 Fed. 397, the union employees quit against the advice of their officers, and told B he could employ non-union men. The court said "The contract is inartificially drawn and in terms imposes no obligation on respondents to furnish labor. It must be given a reasonable construction, however, and so as to maintain its validity, if possible. . . . By it the respondents establish the principle of collective bargaining, obtain the closed shop, 44 hour week, extra rates of pay for overtime, and their own working conditions, all that union labor, so far, has ever contended for. I think the contract is valid, and imposes the reciprocal obligation on respondents to work according to the contract in good faith. There is no doubt the action of the men was arbitrary and amounted to a breach of the contract."

[3] Our law now recognizes a contract right as property which is to be protected against undue interference by persons not parties to the contract. When a third party intentionally, by the use of any kind of means, causes a breach of the contract involving damage, he is *prima facie* guilty of a tort." *Booth & Bros. v. Burgess* (1906) 72 N. J. Eq. 181, 65 Atl. 226. For a discussion of the use of persuasion to induce a person to refrain from contracting, see Smith, *Crucial Issues in Labor Litigation* (1907) 20 HARV. L. REV. 253, 266.

[4] *Morgan v. Andrews* (1895) 107 Mich. 33, 64 N. W. 869; *Doremus v. Hennessy* (1898) 176 Ill. 608, 52 N. E. 924; *Beekman v. Marsters* (1907) 195 Mass. 205, 80 N. E. 817.

cases from further discussion. This action by a third person may be of importance in labor litigation either: (1) by causing a breach of contract for personal services; or (2) by causing a breach of a trade contract.[5]

A breach of contract for personal services may be procured or brought about by a third party in one of two ways: F (outsiders, generally other unions) may induce A (a group of laborers) to strike in violation of their contract with B; or A (union employees of B) may, by threat of a strike, compel B to discharge C. Thus a third person is interfering through the employer or employee.[6] The first question to be answered is whether a contract has in fact been broken. This can be determined only by analyzing the actual relationship between B and C. There may be a definite contract of employment between the two, but very seldom is that the case. It is true that wherever C is in B's employ, this relationship is often called a contract of employment. But it is submitted that there is often no effective contract at all between them, or at most there is only a contract from day to day or from week to week. Upon analysis it may be seen that in many instances B merely makes to C an offer to pay him a stated wage per day. C accepts this offer by working. Thus a unilateral contract comes into existence—B being under a duty to pay C the amount stipulated for the work done. Consequently the only breach of a contract possible is in case B should refuse to pay C. Thus any inducement brought to bear on B or C to terminate the employment at the end of the day can accomplish but two things—a withdrawal of B's offer or a rejection of the offer by C. Neither of the parties is under a contractual duty as to succeeding days and consequently no third person can induce a breach thereof. There is, of course, a certain interest in fact involved, which the courts protect to a limited extent. They have created the right to a free flow of labor, as explained previously; but this is quite different from a right that one who has already contracted shall not be induced to commit a breach.[7]

[5] The general view is to consider that the same rules are applicable to both cases. *Beekman v. Marsters, supra.* There is a minority doctrine, however, that holds that there is no liability in the latter case. *Ashley v. Dixon* (1872) 48 N. Y. 430 (see discussion of this case in *Posner Co. v. Jackson* (1918) 223 N. Y. 325, 119 E. 573); *Boyson v. Thom* (1893) 96 Calif. 578, 33 Pac. 492.

[6] "That the interest of an employer or an employee in a contract for services is property is conceded. Where defendants in combination or individually undertake to interfere with and disrupt existing contractual relations between the employer and the employee. it is plain that a property right is directly invaded." *Jersey City Printing Co. v. Cassidy* (1902) 63 N. J. Eq. 759, 53 Atl. 230. An excellent discussion as to what constitutes justification is to be found in *Glamorgan Coal v. South Wales Miners Federation* [1903] 2 K. B. 545.

[7] "A large part of what is most valuable in modern life seems to depend more or less directly upon 'probable expectancies.' When they fail, civilization as at present organized, may go down. As social and industrial life develops and grows more complex these 'probable expectancies' are bound to increase. It

Despite the fact in the case put there is no contractual relation between B and C, some courts are inclined to treat it substantially as if there were. This is doubtless due to the origin of this kind of action. Originally its basis was in tort for the seduction of C, causing a loss of C's services to B. Even though this seduction theory is properly exploded, there seems to be a vestige of it still remaining in the minds of the courts.[8]

The other important situation is that which involves the breach of a trade contract.[9] Thus A may strike against B to compel B to cease

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would seem to be inevitable that courts of law, as our system of jurisprudence is evolved to meet the growing wants of an increasingly complex social order, will discover, define and protect from undue interference more of these 'probable expectancies.'" *Jersey City Printing Co. v. Cassidy, supra.* It may be observed, however, that an express contract also creates that sensation called a "probable expectancy." In both classes of cases alike the question is as to whether there exist rights *in rem* that third persons shall not cause disappointment in the fulfilment of reasonable expectations.

[8] The history of this remedy is discussed in *Employing Printers' Club v. Doctor Blosser Co.* (1905) 122 Ga. 509, 50 S. E. 353. The court then sums up its opinion in this manner. "In the case at bar the relation of master and servant did exist between the plaintiff and his employees, and even applying the common-law rule of liability, the defendants would be answerable in damages to the plaintiff for a malicious procurement of the breach of contract by its employees. The term 'malicious,' used in this connection, is to be given a liberal meaning. The act is malicious when the thing done is with the knowledge of the plaintiff's rights, and with the intent to interfere therewith. It is a wanton interference with another's contractual rights."

In *Thacker Coal Co. v. Burke* (1906) 59 W. Va. 253, 53 S. E. 161, the court said: "A party cannot have a justifiable cause to instigate, to move, the breach of a contract between master and servant. . . . When his action, with knowledge on his part of a contract, causes, by intention, a breach of that contract, he is liable to damages, even though he acts for the promotion of his own interest." While this court recognizes that there is actually no contract in existence, yet "it is a subsisting contract between the company and its servants in process of execution." Obviously this is merely an expectancy that C will continue to work, and is an expectancy and not a contract, and should be treated as such. In principle, there seems to be no difference from the situation where X has bought from Y's store for years, and Z suddenly induced him to stop buying. A contract would have resulted, but any interference by Z is merely interference with an expectancy. The court, however, would imply a contract—"by the language used in the books a contract must exist. This count says the miners were *'employed'* by the plaintiff and in actual service. Now, if the law gives action for enticement of a servant, it is not conceivable that a third person can maliciously entice away a lot of employees, simply because there was no contract fixing term of service. The relation of master and servant exists. In such case there is a contract recognized by law, an implied contract by which the employee can recover for his service. By entering such service the employee agrees, contracts to work."

"A right of action against a third party for enticing one party to breach its contracts with another is universally recognized. . . . The principle is also equally applicable whether the contract is at will or otherwise." *Third Ave. Ry. v. Shea* (1919, Sup. Ct.) 109 Misc. 18, 179 N. Y. Supp. 43; *Lamb v. Cheney & Son* (1920) 227 N. Y. 418, 125 N. E. 817.

[9] As shown in note 5, this is not considered a tort in some jurisdictions.

dealing with D, B having a contract of purchase or sale with D. This is of frequent occurrence at the present time, and presents a question of considerable difficulty. There is here a clear case of a third person procuring a breach of contract. The courts which hold this to be a tort are disposed to be more liberal in finding a justification than where there is a procurement of a breach of contract of service.[10]

This liberality is based on economic reasons. Since the mores have permitted an extension of the privilege to strike, and since most commercial transactions are in contract form, the only way to give effect to such broader liberty of action by employees is to qualify the doctrine that interference by a third person with contractual obligations is actionable.

There still remain various situations involving contractual obligations which are not included in the preceding general classification. A few of these may be discussed briefly. A case of not infrequent occurrence is that in which A is under a contract with B not to join a union, or to do or refrain from some similar act not in the nature of personal service. X (union organizer) attempts to unionize A in violation of this contract. The general rule is to hold that B has a cause of action against X.[11]

Another situation of frequent occurrence is that in which A strikes against B, because of some dispute involving only these two parties, but D suffers a loss because B is now unable to carry out his contract with D, and supply him with goods, for instance. Since A's acts are not for the purpose of injuring D, and this is an incidental damage, it seems that the mere existence between B and D should not give a right to D as against A; yet D is sometimes given a remedy.[12] An even

[10] "The law is pretty thoroughly settled both in England and in this country that causing another to violate his contract with a third party, without a legal justification, is an actionable injury, from which it follows that if the defendants [A] by sending the notices to the contractors caused some of them to break their contracts, and did so maliciously and without justification, they made themselves liable at least to an action for damages. But I do not think it can be said that the sending of the notices was without justification. . . . If this is so—if the notice to the contractors [B] was proper and essential to fair dealing, as between them and the plaintiff [C]—the fact that some of them violated their existing contracts cannot be deemed a wrong caused by the defendants." *Parkinson Co. v. Building Trades Council* (1908) 154 Calif. 581, 98 Pac. 1027; *Cohn & Roth Electric Co. v. Bricklayers' Union* (1917) 92 Conn. 161, 101 Atl. 659.

[11] *Flaccus v. Smith* (1901) 199 Pa. 128, 48 Atl. 894. *Callan v. Exposition Cotton Mills* (1919) 149 Ga. 119, 99 S. E. 300. Many courts simply put these cases on the ground of an unjustified interference with B's business without regard to the question whether it is an interference with contractual obligation. *Hitchman Coal & Coke Co. v. Mitchell* (1917) 245 U. S. 229, 38 Sup. Ct. 65. Cf. *Diamond Block Coal Co. v. United Mine Workers* (1920, Ky.) 222 S. W. 1079.

[12] "We find the complainant (D) to be in the position of one seeking to preserve his contract with another from impairment through the unlawful acts of a third person, *stranger both to the contract and to the affairs of either party thereto*. There can be no distinction in principle between a right of action founded on an attempt to *induce* a breach of contract and an attempt by force

stronger case than this, is where A strikes against B to have C discharged, and B has A restrained because A's acts would cause B to violate his contract with D.[13]

The chief difficulty, however, in cases of violation of contract rights in labor cases—in fact in almost any case involving a labor dispute—is the problem of remedies. Obviously the natural and ordinary remedy would be to compel A to work by means of a mandatory injunction. This, however, is opposed to our present mores. It is thus impossible to compel A to work.[14] Where a strike is held to be illegal, the usual remedy is to enjoin the officers of the union from calling and aiding the said strike, and from paying strike benefits, etc.[15]

The use of the injunction is in this way partly successful, but does not always prevent a continuance of a strike. In addition to this, there may be considerable harm suffered before the injunction is obtained. Thus it seems that damages are often necessary in addition to an injunction (if an injunction can be had), but here, too, damages are ineffective where the harm is irreparable. The present tendency of the courts and of legislation seems to be to award damages instead of injunctive relief.[16] There is a further difficulty resulting from the fact that labor unions are often unincorporated and loose associations. Yet

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or violence to bring about the same results. From the authorities referred to, it seems clear that a right of action between the complainant and the defendants, who are alleged to be fomenting a strike by violence, is stated in the bill, one which is independent of any right of action in the Overland, which was not, therefore, an indispensable or even a necessary party." *Dail-Overland Co. v. Willys-Overland* (1919, N. D. Ohio) 263 Fed. 171. *Niles-Bement-Pond Co. v. Iron Moulders' Union* (1917, S. D. Ohio) 246 Fed. 851; *Carroll v. Chesapeake & Ohio Coal Co.* (1903, C. C. A. 4th) 124 Fed. 305.

[13] *Aberthaw Construction Co. v. Cameron* (1907) 194 Mass. 208, 80 N. E. 478.

[14] This is well brought out in the opinion of Mr. Justice Harlan in *Arthur v. Oakes* (1894, C. C. A. 7th) 63 Fed. 310, "It would be an invasion of one's natural liberty to compel him [A] to work for or to remain in the personal service of another. One who is placed under such constraint is in a condition of involuntary servitude,— a condition which the supreme law of the land declares shall not exist within the United States, or in any place subject to their jurisdiction. . . . The rule, we think, is without exception that equity will not compel the actual performance by an employé of merely personal services any more than it will compel an employer to retain in his personal service one who, no matter for what cause, is not acceptable to him for services of that character." See, however, the case of *Toledo Railroad Co. v. Pa. Co.* (1893, N. D. Ohio) 54 Fed. 746, affirmed in *Ex parte Termon* (1897) 166 U. S. 548, 17 Sup. Ct. 658, where an employee remaining in employment, was adjudged in contempt of court for refusing to perform acts specified in the injunction.

[15] The effect of statutes prohibiting injunctions in labor disputes and other labor legislation will be discussed in a later comment.

[16] *Barnes v. Berry* (1907 S. D. Ohio) 156 Fed. 72; *Purvis v. United Brotherhood* (1906) 214 Pa. 349, 63 Atl. 585; *Lohse Patent Door Co. v. Fuelle* (1908) 215 Mo. 421, 114 S. W. 997. Of course an injunction may be had against illegal means, such as violence, intimidation, or fraud. See COMMENTS (1921) 30 YALE LAW JOURNAL, 404.

in a number of recent cases courts have granted relief against such an association of employees whether incorporated or not.[17]

FREEDOM OF SPEECH AND STATES' RIGHTS

In *Gilbert v. Minnesota* (1920) 41 Sup. Ct. 125, the question of freedom of speech was presented to the federal Supreme Court from a new angle. The issue was the constitutionality of a state statute making unlawful any advocacy against enlistment in the federal military or naval forces or against aiding the United States in the prosecution of war. This question is of great importance, in view of the number and drastic character of state sedition laws passed as a result of the World War, many of them after the Armistice.[1] It raises primarily the issue of conflicting state and federal powers. The issue of freedom of speech was, however, directly raised, since Justice Brandeis, dissenting,[2] held that freedom of speech was a "privilege or immunity" of a United States citizen within the terms of the constitutional protection, and was also a "liberty" of which a citizen cannot be deprived without due process of law. The majority did not decide the point further than to hold that Gilbert's conviction would not violate such constitutional guarantees of freedom of speech if they existed.[3] The opinion

[17] *St. Germain v. Bakery Workers' Union* (1917) 97 Wash. 282, 166 Pac. 665; *Michael v. Hillman* (1920) 112 Misc. 395, 183 N. Y. Supp. 195. Where there is a strict observance of the common-law rules, however, it is necessary to sue the individuals composing the association. An excellent discussion of this question is to be found in *St. Paul Typothetae v. Book-binders' Union* (1905) 94 Minn. 351, 102 N. W. 725. That a voluntary association (i. e. unincorporated) is liable for punitive damages, see *Clarkson v. Laiblan* (1919, Mo.) 216 S. W. 1029. The court held the association liable for the wrongful acts of its officers acting within authority. For opposing view see *Michaels v. Hillman* (1920, Sup. Ct.) 112 Misc. 395, 183 N. Y. Supp. 195.

[1] These are collected in Chafee, *Freedom of Speech* (1920) Appendix V, 399-405. For comment on the Connecticut statutes of 1919, see (1919) 29 YALE LAW JOURNAL, 108. The Minnesota statute in question (Laws 1917, ch. 463) is not limited to the period of war and makes unlawful any kind of teaching against enlistment. Even this was not sufficiently drastic, and hence in 1919 (Laws 1919 ch. 93) it was strengthened and the usual maximum penalty of twenty years' imprisonment was incorporated. The latter act seems, however, to be limited to the time of war.

[2] The majority opinion was by Mr. Justice McKenna, Mr. Justice Holmes concurring in the result. Chief Justice White dissented on the ground that after Congress had passed the Espionage Act, there was no further room for state action. Mr. Justice Brandeis dissented for similar reasons and also for the reason stated in the text.

[3] Quoting *inter alia* from *Schenck v. United States* (1919) 249 U. S. 47, 39 Sup. Ct. 247. But in that case the entire court agreed that the words used must be used in such circumstances and be of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress may prevent. See (1919) 29 YALE LAW JOURNAL, 337. This case has never been overruled. A recent application of this test to set aside a conviction under the federal Act appears in *Beck v. United States* (1920, C. C. A. 7th) 268 Fed. 195 (conviction of a native born citizen, for twenty years a county judge, because at a